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NO. 87-458

In the Supreme Court of the United States

OCTOBER TERM, 1987

ANTONIO NIEVES, et al.
Petitioners,

v.

HESS OIL VIRGIN ISLANDS CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does the Contract Clause Impose A Different Judicial Standard Than the Due Process Clause?

II. Is the Contract Clause Violated by a Virgin Islands Law which Retroactively Alters Private Contractual Relations by Substantially Increasing a Private Employer's Burdens in a Manner Which is Both Unreasonable and Unnecessary?

III. Does a Retroactive Law which Is Designed to Alter the Outcome of Pending Litigation, So As to Increase the Revenues of the Virgin Islands Workmen's Compensation System at the Expense of the Island's Largest Employer Violate the Taking Clause or the Due Process Clause?

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STATEMENT OF THE CASE

In 1976, Hess Oil Virgin Islands Corp. ("Hess" or "HOVIC")[1] and Litwin Panamerican Corporation ("Litwin") entered into a contract whereby Litwin provided personnel to perform general maintenance and turnaround work at the Hess refinery on St. Croix. Under that contract, Litwin classifies its workers into two groups. Employees in the class involved here are Type I personnel, who are furnished "as loanees under HOVIC's direction and control in the numbers and by the skills as ordered from time to time by HOVIC." *Nieves v. Hess Oil Virgin Islands Corp.*, 819 F.2d 1237, 1240 (3d Cir. 1987) (Petition for Certiorari [Pet. for Cert.] at A-6). Hess assumed direct control over these employees, and Litwin was not "responsible to HOVIC or liable for the workmanship of such personnel or for any mistake, error or act of negligence of such personnel." *Id.* (Pet. for Cert. at A-6). Hess reimburses Litwin for all payroll expenses for Type I employees, including workmen's compensation premiums. *Id.* at 1245-46 (Pet. for Cert. at A-18, A-19). Litwin's practice was to have each Type I employee sign a Hess loanee form, which states:

> This is to inform you of the conditions under which you will be working as a "HESS LOANEE." You should be aware that while working as a loanee:
>
> 1. HOVIC personnel will control, direct, and supervise all aspects of your work.
> 2. At no time should you receive, or act under instructions from Litwin Supervision.
> 3. HOVIC will provide you with safety equipment and will ensure that all safety conditions surrounding your work are met.

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[1] Hess Oil Virgin Islands Corp. is a wholly-owned subsidiary of Amerada Hess Corp. An affiliated company is the St. Croix Petrochemical Corp.

Quoted in Nieves, 819 F.2d at 1240 (Pet. for Cert. at A-7).

In 1984, the United States District Court for the Virgin Islands held that the "borrowed servant" doctrine applies in the Virgin Islands (as it does in most states), and that this doctrine bars a tort action by a borrowed employee against a borrowing employer, like Hess. *See Vanterpool v. Hess Oil Virgin Islands Corp.*, 589 F. Supp. 334, 339 (D.V.I. 1984), *aff'd in part and rev'd in part*, 766 F.2d 117 (3d Cir. 1985), *cert. denied*, 474 U.S. 1059 (1986). This holding was an explicit judicial acknowledgement of the borrowed servant doctrine, which had long been relied upon by Hess in structuring its Virgin Islands business relations and in defending tort suits there. *See, e.g., Yves Charlec et al. v. Hess Oil Virgin Islands*, Civ. No. 255/1981 (D.V.I.) (asserting borrowed servant doctrine as defense in answer in 1981 and again in summary judgment motion one year later).

On October 19, 1984, the territorial Senate amended the Workmen's Compensation Act so as to abrogate the borrowed employee doctrine. *See* V.I. Code Ann. tit. 24, §263a (1986). In *Vanterpool*, the Third Circuit agreed with the District Court that the borrowed employee doctrine applied in the Virgin Islands and noted that the 1984 amendment's effect was "prospective only." 766 F.2d at 119 n.1.

On January 23, 1986, during the pendency of the instant actions, the territorial Senate again amended the Workmen's Compensation Act to abrogate the borrowed employee doctrine. 1986 Sess. Laws 498 (an amendment to V.I. Code Ann. tit. 24, §284). This amendment was made applicable to "claims pending as of the effective date of this Act; regardless of when the accident which gave rise to the claim occurred." 1986 Sess. Laws 498, §1(b) (Pet. for Cert. at 2). In that single day, the bill was introduced, assigned by Senate President Hodge to the Committee of

the Whole, called to the floor by Special Order of Senator Hodge, and passed by the territorial legislature. This abbreviated approach bypassed the usual committee process.[2]

In presenting the bill, its sponsor made it clear that this retroactive legislation was aimed directly at Hess in the very cases now before this Court:

> You take an employee of Litwin which is a subcontractor of Hess, the Litwin employee cannot sue Litwin for an injury caused by a Litwin Employee or as a result of Litwin's negligence. But the employee could sue Hess if the accident occurred on Hess work place, and there is some responsibility for the injury on the part of Hess.... Everything was going fine until the courts began to uphold what is called the "borrowed servant" doctrine.... [T]he Litwin employee is now being construed to be an employee of Hess. And that, as a matter of law, now is preventing the Litwin employee from suing Hess for negligence caused by a Hess employee.

Third Circuit Appendix in *Prevost v. Hess Oil Virgin Islands Corp.* [3d Cir. App.] at 168-69.

On February 5, 1986, Governor Juan Luis vetoed the bill. In his veto message, the Governor noted the cases then pending in which Hess had asserted the borrowed employee defense:

> The most damaging result that I perceive should the measure become law, however, is that an already severely threatened Virgin Islands insurance industry would be dealt a possibly fatal

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[2] The bill did not even appear on the Agenda prepared for that day; instead, on the morning the bill was introduced, the rule requiring listing on the Agenda was waived. Indeed, even reading of the bill was waived.

> blow should recoveries in the six cases pending before the District Court even approach the [$5,500,000] prayed for.

3d Cir. App. at 177. Governor Luis also remarked upon the legislature's cursory consideration of the bill:

> [It] was introduced and passed on the same day, quite possibly without full understanding of its implications and effects by some of the members voting for it.... [T]he question...is...one that demands close scrutiny and careful deliberation. This was not permitted to occur.

Id. at 177-78. *See also Nieves*, 819 F.2d at 1241. On February 27, 1986, without any discussion or debate whatsoever, the legislature overrode the Governor's veto. 3d Cir. App. at 183.

The challenged law was enacted specifically to abrogate the borrowed employee defense in cases *already pending* before the federal Court of Appeals and District Court -- Petitioners' cases. Even the Official Explanation accompanying the legislation evidences the direct targeting of Hess:

> Take a situation where a Litwin employee is injured at Hess. Under the present law, the Courts say our Legislature intended not only to grant immunity to the injured worker's employer, Litwin, but also to Hess. The Bill would avoid that.... Under the bill, for example, if the Litwin employee is badly hurt as a result of the negligence of Hess and the employee has collected $25,000.00 in workmen's compensation benefits, if he can sue Hess for his injury, the first

> $25,000.00 of his recovery is paid to workmen's compensation.

Id. at 162-63.

Petitioners herein (and one other plaintiff) instituted these actions against Hess in the United States District Court for the Virgin Islands before the passage of the challenged statute. Also, before the challenged 1986 statute's passage, and on the basis of the ruling in *Vanterpool* that the 1984 amendment operated prospectively only, the District Court applied the borrowed employee doctrine, and granted Hess summary judgment against Petitioners Nieves, Taylor, Thomas, and Cotto. *Nieves*, 819 F.2d at 1242 (Pet. for Cert. at A-10). All four appealed to the Third Circuit.

After passage of the retroactive statute, the District Court upheld its retroactive application in pending cases brought by Petitioner Prevost and one other plaintiff. That court rejected Hess' constitutional attack on the retroactive amendment, concluding that "the borrowed employee doctrine is no longer a valid defense." *Prevost v. Hess Oil Virgin Islands Corp.*, 640 F. Supp. 1220, 1225 (D.V.I. 1986). Hess then filed interlocutory appeals to the Third Circuit in these two cases, which were consolidated with the prior appeals by the other four Petitioners.[3]

The Court of Appeals for the Third Circuit reversed the District Court's constitutional ruling. They held the retroactive statute to be a violation of the Contract Clause of the Virgin Islands Organic Act, following this Court's precedents under the Contract Clause of the U.S. Constitution. Judge Sloviter's opinion for the Third Circuit found a

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[3] One of these six plaintiffs later settled, so only five cases remain active.

valid, pre-existing contract between Hess and each of the plaintiffs (Petitioners), a substantial impairment of those contracts by the 1986 Virgin Islands statute, and a lack of reasonableness or necessity to justify that impairment. *Nieves*, 819 F.2d at 1252 (Pet. for Cert. at A-30). The Court of Appeals for the Third Circuit, without dissent, later denied Petitioners' motions for rehearing and for rehearing en banc.[4]

Petitioners subsequently filed their Petition for a Writ of Certiorari.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE PETITION RAISES NO IMPORTANT, UNSETTLED QUESTIONS WORTHY OF THIS COURT'S TIME

A. *The Well-Settled Difference in Judicial Scrutiny of Contract Clause Claims and Due Process Clause Claims is Based Upon Constitutional Text, History, and Precedent*

The principal argument presented in the Petition for Certiorari would require this Court to overrule a line of well-established precedents dealing with the Contract Clause and the Due Process Clause. Petitioners baldly assert that the difference between the heightened level of judicial scrutiny under the Contract Clause, applicable only to states and territories, and the more relaxed scrutiny of Congressional legislation, under the Due Process Clause, "has never been directly confronted by the Supreme

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4. In a collateral proceeding, the Third Circuit, on September 22, 1987, also rejected a motion for remand on the ground that 28 U.S.C. §2403(b) is not applicable to the Virgin Islands.

Court." Pet. for Cert. at 6. But this Court has fully settled that very issue several times, in a series of consistent rulings, and the Third Circuit merely applied this well-settled law. As recently as 1984, this Court unanimously rejected the very same argument now urged by Petitioners, insisting:

> We have never held, however, that the principles embodied in the Fifth Amendment's Due Process Clause are coextensive with prohibitions existing against state impairments of preexisting contracts.

Pension Benefit Guaranty Corporation v. R. A. Gray & Co., 467 U.S. 717, 733 (1984), *citing Philadelphia, B. & W. R. Co. v. Schuber*, 224 U.S. 603 (1912). The *Gray* Court added:

> Indeed, to the extent that recent decisions of the Court have addressed the issue, we have contrasted the limitations imposed on States by the Contract Clause with the less searching standards imposed on economic legislation by the Due Process Clauses.

467 U.S. at 733, *citing United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 n.13 (1977).

One year later, this Court, again in a unanimous opinion, reaffirmed: "When the court reviews state economic legislation the inquiry will not necessarily be the same. [citing *Gray*] . . . [T]o the extent the standards differ, a less searching inquiry occurs in the review of federal economic legislation." *National R.R. Passenger Corp. v. Atcheson, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 472-73 n.25 (1985)(Marshall, J., for all members of the Court, except Powell, J., who took no part). *Cf. Camden United Bldg. & Constr. Trades v. City of Camden*, 465 U.S. 208, 220-23

(1984) (contrasting judicial scrutiny under Privileges and Immunities Clause with review under Contract Clause); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 880-81 (1985) (contrasting Commerce Clause and Equal Protection Clause analysis).

The distinction between Due Process and Contract Clause analyses is rooted not only in the actual language of the Constitution but also in its history. *See Gray*, 467 U.S. at 723 n.9, *relying upon* ELLIOTT, DEBATES ON THE FEDERAL CONSTITUTION 546 (2d ed. 1876), and 2 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 619 (1911). *See generally* Kmiec & McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 Hastings Const. L.Q. 525, 529-34 (1987).[5]

Thus, in the instant case, the Third Circuit simply applied this Court's well-established precedents on this point. *See Nieves v. Hess Oil Virgin Islands Corp.*, 819 F.2d 1237, 1243, 1251 (3d Cir. 1987) (Pet. for Cert. at A-13, A-28 to A-29). The other Courts of Appeals have done the same. *See, e.g., New England Baptist Hospital v. United States*, 807 F.2d 280, 284-85 (1st Cir. 1986); *Canisius College v. United States*, 799 F.2d 18, 25 (2d Cir. 1986), *cert. denied*, 107 S.Ct. 1887 (1987); *Terson Co., Inc. v. Bakery Drivers and Salesmen Local*, 739 F.2d 118, 120-21 (3d Cir. 1984); *Peick v. Pension Benefit Guaranty Corp.*, 724 F.2d 1247, 1263-66 (7th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984).

In short, Petitioners have failed to present any

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5. Furthermore, the more searching scrutiny under the Contract Clause compared to the Due Process Clause represents a good public policy, reflecting the different nature of Congressional statutes and state or territorial legislation. See Part III B, *infra*.

reason for this Court to overrule its well-settled line of precedents--which are textually based, historically rooted, and supported by solid public policy. These precedents firmly establish that the Third Circuit was correct in applying searching judicial scrutiny under the Contract Clause.

B. *The Territorial Legislation Invalidated in This Case is Not the Same as the Congressional Statute Considered in the Louviere Case*

Petitioners repeatedly assert that the retroactive Virgin Islands statute invalidated in this case is "modelled after an identical retroactive Congressional enactment," upheld by the Court of Appeals for the Fifth Circuit. Pet. for Cert. at 8. This assertion is simply incorrect. The Congressional statute--amendments to the Longshoremen's and Harbor Workers' Compensation Act, Pub. L. No. 98-426, 98 Stat. 1639 (1984)--was designed to overrule *Washington Metropolitan Area Transit Auth. v. Johnson*, 467 U.S. 925 (1985). That case dealt only with the narrow question of the immunity of general contractors from tort claims by their subcontractors' employees. Therefore, the 1984 federal act designed to overrule *Washington Metro* provided:

> For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails [to pay workmen's compensation].

33 U.S.C. §905(a). This federal statute was upheld in *Louviere v. Marathon Oil Co.*, 755 F.2d 428 (5th Cir. 1985).

The 1986 Virgin Islands statute involved in the instant case does include this same language--dealing with general contractors and subcontractors--*but* it goes on to

repeal the borrowed servant doctrine retroactively, with the following language:

> The "statutory employer and borrowed servant" doctrine are not recognized in this jurisdiction, and an injured employee may sue any person responsible for his injuries other than the employer named in a certificate of insurance issued under Section 272 of this Title.
>
> (b) Title 24, Section 284, Subsection (b), as added by Section 1 of this Act shall apply to:
> (1) claims filed after the effective date of this Act; and
> (2) *claims pending as of the effective date of this Act;* regardless of when the accident which gave rise to the claim occurred.

1986 V.I. Sess. Laws 498 (emphasis added). It is *this* unconstitutional language (which was *not* included in the valid 1984 federal legislation) that is the subject of *this* lawsuit. Indeed, the "legislative history of the 1984 [federal statute] unambiguously demonstrates" that it did *not* repeal or amend the borrowed servant doctrine. *West v. Kerr-McGee Corp.*, 765 F.2d 526, 530 (5th Cir. 1985). *Accord Alexander v. Chevron, U.S.A.*, 806 F.2d 526, 529 (5th Cir. 1986), *cert. denied*, 107 S.Ct. 3229 (1987).

The 1986 Virgin Islands statute does more than the Congressional statute involved in *Louviere*, and it is this something more--retroactive repeal of the borrowed servant doctrine--which was challenged by Respondent in the instant case and which rightly resulted in the invalidation

of the retroactive portion of that Virgin Islands Law.[6]

In short, Petitioners can find no solace in the Fifth Circuit's *Louviere* opinion for two reasons: (1) The Contract Clause provides much stricter standards for territorial legislation than the Due Process Clause provides for Congressional legislation, and (2) These two statutes are, in any event, totally different in directly relevant respects.

II. THE COURT OF APPEALS CORRECTLY RULED THAT A TERRITORIAL STATUTE WHICH FUNDAMENTALLY IMPAIRS WELL-ESTABLISHED CONTRACTUAL RELATIONS VIOLATED THE CONTRACT CLAUSE OF THE VIRGIN ISLANDS ORGANIC ACT

The Court of Appeals for the Third Circuit correctly ruled that the Virgin Islands statute retroactively abrogating the borrowed servant defense violated the Contract Clause of the Virgin Islands Revised Organic Act.[7] Though this ruling was based upon rules and principles derived from this Court's well-established Contract Clause precedents, the Third Circuit's statutory interpretation has no direct effect outside the Virgin Islands.

Since the early years of the American Republic, the Contract Clause of the U.S. Constitution[8] has stood as a bulwark against state attempts to repudiate or impair the contractual expectations of private parties. *See United*

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6. Respondent Hess does not challenge the *prospective* aspect of this statute, §(b)(1) above, nor does it challenge the prospective 1984 statute.

7. The relevant provision specifies: "[n]o law impairing the obligation of contracts shall be enacted." 48 U.S.C. §1561 (1982).

8. "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const. art. I, §10, cl. 1.

States Trust Co. v. New Jersey, 431 U.S. 1, 14-15, 17 (1976); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 414 (1978). *See also* Kmiec & McGinnis, *supra*, at 530. As this Court recently observed:

> The severity of an impairment of contractual obligations can be measured by the factors that reflect the high value the Framers placed on the protection of private contracts. Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.

Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 245 (1978). Similarly, the Contract Clause was one of the few specific limitations upon government power included in the original Organic Act of the Virgin Islands, ch. 699, §34, 49 Stat. 1807, 1815 (1936), and it is reaffirmed in the current Revised Organic Act, 48 U.S.C. §1561 (1982).

This Court's recent decisions demonstrate the continuing vitality and strength of the Contract Clause. They require a court, in analyzing a Contract Clause claim, to determine:

(1) Is there a contractual relationship;

(2) What are the contractual terms;

(3) Does the challenged law impair one or more contractual terms;

(4) Is the impairment both:

(a) *necessary* to the accomplishment of a significant and legitimate public purpose, and

(b) imposed upon *reasonable conditions*.

See U.S. Trust, 431 U.S. at 17-21 (invalidating retroactive repeal of statutory bond covenant because this impairment was neither reasonable nor necessary to serve an important public purpose); *Allied Structural Steel*, 438 U.S. at 244-51 (invalidating state act which retroactively imposed new pension obligations upon an employer). *See generally* M.D. GELFAND, FEDERAL CONSTITUTIONAL LAW AND AMERICAN LOCAL GOVERNMENT 117-19 (1984). When this stringent judicial analysis is applied to the challenged Virgin Islands statute, that retroactive law cannot pass constitutional muster.

A. *Respondent Has Well-Established Contractual Relationships*

The retroactive statute invalidated in this case materially and substantially impaired two sets of contracts--the contracts of hire between Hess and its borrowed employees and the contract between Hess and Litwin.

The Third Circuit correctly concluded that a contractual relationship exists between Hess and its loanee employees. All five Petitioners were hired by Litwin to work as Hess Loanee employees pursuant to the Hess/Litwin Personnel Agreement. Each Petitioner entered into a contract of hire with Hess and signed a document informing him that he would be working as a "Hess Loanee" under the supervision and control of Hess. At the time of the alleged injuries, each Petitioner had been working continuously for an extended period of time as a loanee;

therefore, each had ample opportunity to assess and acquiesce in the risks attendant to this special employment. Under these circumstances, no one now can question the existence of a contract of employment between each of Petitioners and Hess. *See Vanterpool v. Hess Oil Virgin Islands Corp.*, 589 F.Supp. 334 (D.V.I. 1984), *rev'd in part on other grounds*, 766 F.2d 117 (3d Cir. 1985), *cert. denied*, 474 U.S. 1059 (1986); *Nieves*, 819 F.2d at 1244 (Pet. for Cert. at A-14 to A-19).

Since 1976, Hess also has been party to a labor brokerage contract, in which Litwin provides personnel to be under the "direct supervision, direction, and control" of Hess. *Nieves*, 819 F.2d at 1240 (Pet. for Cert. at A-6). In turn, Hess includes payroll expenses, *including workmen's compensation premiums*, in the time and materials rate paid to Litwin. *Id.* at 1246 (Pet. for Cert. at A-19). Hess thereby budgets the expense of workmen's compensation for its borrowed employees as a cost of doing business. Indeed, the shifting of the costs of industrial accidents to the price of the finished goods is a major rationale behind workmen's compensation schemes. *See* A. LARSON, WORKMEN'S COMPENSATION LAW §1.00 (1985). The Litwin/Hess labor brokerage contract and the long-standing course of business between these two companies are protected by the Contract Clause from the unreasonable and unnecessary interference by the challenged amendment. *See E.& E. Hauling, Inc. v. Forest Preserve Dist.*, 613 F.2d 675, 680 (7th Cir. 1980) ("the District used its legislative authority to prevent the [party] from fulfilling its contract"). The retroactive statute fundamentally restructured the contractual relations between these two private parties, thereby substantially impairing the contract. As the restructuring was retroactive, it was impossible for the parties to bargain and rearrange the burdens

imposed by the new law.

B. *The Borrowed Servant Defense Was A Term of the Contracts*

The exclusive remedy provision of the Virgin Islands Workmen's Compensation Act in effect at the time the agreement was reached between Hess and its borrowed employees is an implied term of the contract between the parties. *See Wood v. Lovett*, 313 U.S. 362, 369 (1941); *Indiana* ex rel. *Anderson v. Brand*, 303 U.S. 95, 100-01 (1938). Where, as here, an employee begins work for an employer covered under the Workmen's Compensation Act, he is automatically limited to remedies under the compensation scheme. *Vanterpool*, 766 F.2d at 122-23. At the times Petitioners and Hess entered into contracts of hire, as well as on the dates of alleged injuries, the Act provided that workmen's compensation was their exclusive remedy against Hess. Indeed, payment of workmen's compensation premiums "is the recognized quid pro quo for the employer's insulation from tort liability to its employees." *Nieves*, 819 F.2d at 1246 (Pet. for Cert. at A-19, *citing Washington Metropolitan Area Transit Auth. v. Johnson*, 467 U.S. 925, 931-32 (1984); and *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 282 & n.24 (1980). Thus, Hess' tort immunity was the inevitable consequence of Hess' compliance with the Act. *See Nieves*, 819 F.2d at 1246 (Pet. for Cert. at A-19 to A-20).

C. *The Legislation Was A Substantial Impairment of Hess' Contractual Relations*

The Virgin Islands statute did much, much more than simply extend a statute of limitations or slightly modify remedies. Rather, it destroyed the contractual provisions which limited Petitioners solely to workmen's compensation remedies for injuries incurred in the scope of their employment. It was, therefore, similar to the

statutory provision invalidated in *Allied Structural Steel*, where this Court observed that "severe impairment . . . will push the inquiry to a careful examination of the nature and purpose of the state legislation." 438 U.S. at 245. Furthermore, the statute in the instant case was not designed to deal with an emergency nor to effectuate a temporary alteration of contractual relations. *Compare Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934) (legislation aimed at a serious housing emergency during the Depression; limited to duration of emergency).

The legislature's *retroactive* abrogation of the borrowed employee doctrine has altered the very basis of the labor brokerage contract--the calculation of Hess' labor costs. *See* Part II A and B, *supra*. This *selective* abolition of defenses does not remotely resemble the "generally applicable rule of conduct" involved in *Exxon Corp. v. Eagerton*, 462 U.S. 176, 192 (1983). Rather, Hess' reliance on long-standing, judicially enforced business custom and practice has been trivialized by legislative fiat.

With respect to future cases, Hess may protect itself by changing its business agreements. However, for the five pending cases, whose *ad damnum* clauses total over five million dollars, Hess has no such means to alleviate the serious disruption of its settled expectations.

D. *The Legislation Did Not Further A Significant Public Purpose.*

The "requirement of a legitimate public purpose guarantees that the state is exercising its police power rather than providing a benefit to special interests." *Energy Reserves Group v. Kansas Power & Light Co.*, 459 U.S. 400, 412 (1983). Though the statute purported to "assist persons who are injured while on the job," 3d Cir. App. at 162-63, the legislative history and the Governor's veto message (*see* "Statement of the Case," *supra*, at 3-5),

demonstrate that this retroactive provision was designed to benefit *only six* employees--to the substantial detriment of Hess. *See Nieves*, 819 F.2d at 1250 (Pet. for Cert. at A-27). The territorial legislature had already abrogated the borrowed employee doctrine for all future . . .cases--a matter. . . not challenged in this case--and the Third Circuit had ruled that that provision had prospective effect only. *See Vanterpool*, 766 F.2d at 119-20 n.1. Therefore, the sole effect of the retroactive statute invalidated in this case was to overcome Hess' tort immunity in the handful of already pending suits now being pursued by Petitioners.

The statute singles out the largest private employer in the territory--Hess Oil Virgin Islands Corporation--and substantially increases that targeted employer's burdens on a retroactive basis. The statute's focus remarkably resembles that of the special interest legislation invalidated by this Court in *Allied Structural Steel*. Though both statutes were framed in general terms, neither could be characterized as "one enacted to protect a broad societal interest rather than a narrow class." 438 U.S. at 249. *See also Eagerton*, 462 U.S. at 191 (statute should impose "a generally applicable rule of conduct designed to advance 'a broad societal interest'"). For this reason, the Third Circuit rightly concluded that the Virgin Islands statute was "special interest legislation." *See Nieves*, 819 F.2d at 1251 (Pet. for Cert. at A-29).

1. *The Legislation Was Not Necessary*

In its analysis of the retroactive statute, the Third Circuit employed the more lenient standard applicable to statutes altering contracts between private parties. *See Nieves*, 819 F.2d at 1251 (Pet. for Cert. at A-30). Even

under this lenient standard,[9] the Court concluded that the statute was not necessary to further its asserted purposes. Indeed, the territorial legislature's assertion that the retroactive amendment was necessary to support the Government Insurance Fund is premised upon nothing more than the conjecture of the bill's sponsor.[10]

2. *The Legislation Was Not Imposed Upon Reasonable Conditions*

The retroactive legislation is not based upon "reasonable conditions and of a character appropriate to the public purpose justifying its adoption." *U.S. Trust*, 431 U.S. at 22.

The territorial legislature never considered the reasonableness of the bill *vis-a-vis* its retroactive impairment of employment contracts between Hess and its borrowed employees. In fact, in an eleventh hour dash to avoid the legislative committee process and push the bill through in a single day, the legislature seems to have given little, if any, consideration to the bill. *See* "Statement of the Case," *supra*, at 3-5. Thus, the territorial legislature

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9. Although the contracts at issue are between private parties, it is arguable that a stricter standard is appropriate here, given the governmental self-interest involved. One of the asserted purposes was to supplement the Government Insurance Fund. Under this standard, the governmental assertion of necessity would be examined even more closely, and the availability of alternative means of achieving its goals would be carefully scrutinized. *See U.S. Trust*, 431 U.S. at 30-31. *See also Lynch v. United States*, 292 U.S. 571, 580 (1934) ("To abrogate contracts, in the attempt to lessen government expenditure, would be not the practice of economy, but an act of repudiation.").

10. The retroactive abrogation of the borrowed employee defense can, at most, net the Government Insurance Fund the workmen's compensation paid in those cases-$110,000. *See* 3d Cir. App. at 191-92. Furthermore, such uncompensated transfer of funds violates the Taking Clause. See Part III A, *infra*.

(a creature of Congress) did not exercise its judgment in balancing the reasonableness of the legislation as an exercise of police power against the statute's obvious infringement upon contractual obligations.

The unreasonableness of the statute challenged in the instant case is comparable to the unreasonable statute in *Allied Structural Steel*, where this Court refused to defer to the Minnesota Legislature's determination of reasonableness and public policy with respect to the State's pension act, as that act affected only a limited number of private employment contracts. 438 U.S. at 234. The factors the *Allied Structural Steel* Court considered important included: the lack of a broad, generalized economic or social problem; a severe, permanent and immediate change in the contractual relationships of those within its coverage; and the extremely narrow focus of the legislation. Those same factors are present in the instant case; indeed, the situation is even worse here, where there is also an asserted governmental self-interest.

Here, the challenged amendment affected only the few cases pending at the time of its enactment; it nullified the implied term of Hess' contractual obligations with borrowed employees and imposed a completely unexpected liability. No special conditions lessen that ultimate impact. As in *Allied Structural Steel*, 438 U.S. at 247, there was no "provision for gradual applicability or grace periods," nor was the retroactive statute enacted to deal with a situation comparable to the desperate emergency economic conditions of the Great Depression, *see Blaisdell*, 290 U.S. at 398.

The retroactive nature of the challenged statute greatly interfered with--even abrogated--the labor brokerage contract between Litwin and Hess. Hess, as a business practice, paid the workmen's compensation premiums of Litwin-supplied laborers. This well-

established business custom was supported by Hess' reasonable, long-standing assumption, affirmed in *Vanterpool*, 766 F.2d at 125, that the borrowed employee doctrine applied in the Virgin Islands, as it does in most states.

E. *Hess' Expectations Were Reasonable*

Petitioners maintain that the workmen's compensation scheme constitutes a heavily regulated industry. Pet. for Cert. at 6. First, workmen's compensation is not an industry at all. Second, the existence of heavy regulation is relevant in a Contract Clause case only insofar as the expectations of the participants in a regulated industry are concerned. *See, e.g., Energy Reserves Group*, 459 U.S. at 415 ("at the time of the execution of the contracts, ERG did not expect to receive deregulated prices"); *Veix v. Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 32, 38 (1940) (when one purchases into an enterprise "already regulated *in the particular* to which he now objects, he purchase[s] subject to further regulation *upon the same topic*") (emphasis added). The "expectations" in those cases were that additional regulation *in furtherance* of some long-existing state scheme could occur.

Here, though, the retroactive amendment does not further the aims of the workmen's compensation scheme in the Virgin Islands. Rather, for the sake of only six plaintiffs, and the possible temporary loss to the Government Insurance Fund of some $110,000, *see* 3d Cir. App. at 191-92, the legislature has "regulated" in a manner completely contrary to the goals of the compensation system--the certain recovery by an injured worker, and tort immunity of employers. This retroactive statute runs counter to the existing rationale and operation of the system, and cannot be considered similar in character to those state systems considered in *Energy Reserves Group* or *Veix*.

F. *This Targeted Legislation Cannot Pass Constitutional Muster*

Petitioners cannot justify the legislative decision to

benefit only six plaintiffs by pointing to the small size of the Virgin Islands. Pet. for Cert. at 7. The retroactive statute targets and greatly *burdens* a single entity--Hess. This burden is not a mere incident of population size. As the Explanation to the statute *itself* acknowledges, Hess was directly targeted to bear the burden. *See Nieves*, 819 F.2d at 1250 (Pet. for Cert. at A-27); "Statement of the Case," *supra*, at 3-5. The statute invalidated in *Allied Structural Steel* also had a very specific application to a particular employer. 438 U.S. at 248-49. No legitimate public purpose justifies targeting a single party to bear a substantial burden which should be legislatively addressed in a general fashion. Indeed, the Founding Fathers insisted upon the Contract Clause and similar constitutional provisions which require *generality* in legislation precisely because they were concerned about the potentially oppressive power of local majorities. *See* Part III B, *supra*. By definition, a "legitimate public purpose" *cannot* exist where the class of special beneficiaries and burdened entities is so minute.

III. ADDITIONAL SUBSTANTIAL CONSTITUTIONAL GROUNDS SUPPORT THE COURT OF APPEALS' DECISION

As noted above, the Court of Appeals for the Third Circuit correctly ruled that the retroactive statute violates the Contract Clause of the Virgin Islands Organic Act. It was, therefore, unnecessary for that Court to reach Respondent Hess' other substantial constitutional challenges.[11] It is, however, well-established that "the prevailing party may defend a judgment on any ground which the law and record permit." *See, e.g., United States v. New York Tele. Co.*, 434 U.S. 159, 166 n.8 (1977). *Accord Whitley v. Albers*, 106 S.Ct. 1078, 1088 (1986).

11. In the unlikely event that this Court were to grant certiorari and reverse that well-reasoned decision of the Third Circuit, it would then be necessary for this Court, or the Third Circuit, to rule upon these properly preserved and substantial constitutional claims.

The retroactive abrogation of the borrowed servant doctrine constitutes a taking of Respondent Hess' private property without just compensation[12] and a deprivation of Hess' property without due process of law.[13] Congress has consistently and repeatedly required that the territorial government of the Virgin Islands comply with the strictures of the Taking Clause[14] and due process.[15]

A. *The Retroactive Legislation Constitutes a Taking of Property Without Just Compensation*

The Taking Clause prevents government from imposing the cost of a general public benefit upon a private party without compensating that private party. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) (Marshall, J.); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 138, 153 (1978) (Rehnquist, J., dissenting); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). It "stands as a shield against the arbitrary use of governmental power." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). The Virgin Islands retroactive law violates this clause by taking vested property rights without compensation.

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12. "[N]or shall private property be taken for public use without just compensation." U.S. Const. amend. V.

13. "No State shall. . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV.

14. The original Organic Act of the Virgin Islands, ch. 699, §34, 49 Stat. 1807 (1936), included a Taking Clause, and that requirement continues to be applicable under the Revised Organic Act of the Virgin Islands, 48 U.S.C. §1561 (1982).

15. The original Organic Act of the Virgin Islands, ch. 699, §34, 49 Stat. 1807, 1815 (1936), mandated: "No law shall be enacted in the Virgin Islands which shall deprive any person of life, liberty, or property without due process of law. . . ." This language is reiterated in the Revised Organic Act of the Virgin Islands, 48 U.S.C. §1561 (1982).

1. *Hess Has Vested Property Rights*

Contract rights are a form of property. *U.S. Trust Co.*, 431 U.S. at 19, n.16. *See also Thorpe v. Housing Auth.*,. 393 U.S. 268, 278 n.31 (1969); *Lynch v. United States*, 292 U.S. 571 (1934). So are statutory entitlements. *Fuentes v. Shevin*, 407 U.S. 67 (1972). Furthermore, vested rights include causes of action and defenses which can bar those actions. *Pritchard v. Norton*, 106 U.S. 124, 132 (1882) ("[W]hether [a right of action] springs from contract or from the principles of the common law, it is not competent for the legislature to take it away. A vested right to an existing defence is equally protected."). *Accord Forbes Pioneer Boat Line v. Board of Comm'rs*, 258 U.S. 338 (1922)(Holmes, J.); *Barr v. Preskitt*, 389 F.Supp. 496, 498 (M.D. Ala. 1975); *Hutton v. Autoridad Sobre Hogares de la Capital*, 78 F.Supp. 988, 994 (D.P.R. 1948) (collecting cases).

The various contractual arrangements among Hess, its labor broker Litwin, and its employees (supplied to Hess by Litwin) constitute reasonable, investment-backed expectations, and, therefore, certainly exceed any definition of a "unilateral expectation or abstract need." *See Webb's*, 449 U.S. at 161. *See also* Part II, *supra*. The retroactive alteration and abrogation of these provisions fundamentally realigns the parties' positions during the pendency of these very lawsuits.

2. *There Was a Taking of This Property*

As the Third Circuit correctly observed:

> Since the retroactive application provision was designed to abolish Hess' tort immunity on behalf of those six plaintiffs, it can hardly be viewed as general legislation for the public welfare.

Nieves, 819 F.2d at 1250 (Pet. for Cert. at A-27). *See also*

id. at 1250 n.11; *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 107 S.Ct. 1232, 1243 (1987). The retroactive statute extinguished Hess' long-standing tort immunity, thereby imposing upon Hess substantial financial liability for alleged *prior* injuries and denying Hess a right secured by contract and by a legal defense. *See also* Part II, *supra*. The Taking here is a much more severe deprivation of property than the New York law invalidated in *Loretto*, which transferred a mere 1/8 of a cubic foot of space from one set of private owners to others. 458 U.S. at 422, 443.

3. *This Taking of Substantial Property Was Uncompensated*

The Virgin Islands act invalidated in this case was designed to create new, multi-million dollar tort remedies--damages prayed for against Hess totaled $5.5 million--for a handful of plaintiffs in already pending cases. The secondary purpose was to increase the revenues of the Government Insurance Fund, all at the substantial expense of Hess, without the payment of any compensation whatsoever.

The Third Circuit rightly condemned helping the Government Insurance Fund as a justification:

> Almost any arrangement would then be subject to impairment in order to benefit a potentially faltering or floundering fund. While the need to keep the workmen's compensation fund on a sound financial basis may justify prospective legislation designed for that purpose, it cannot justify this type of retrospective legislation.

Nieves, 819 F.2d at 1252 (Pet. for Cert. at A-30).

Likewise, in *Webb's*, 449 U.S. at 163, this Court unanimously found expropriation of interest on funds deposited in interpleader cases constituted "a forced contribution to general governmental revenues, . . . not reasonably related to the costs of using the courts." *Id.* at

163. *See also Nollan v. California Coastal Comm'n*, 107 S.Ct. 3141, 3147 n.4 (1987) (Taking Clause bars "Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.")

B. *The Retroactive Amendment Violates Due Process*

1. *The Legislation is Irrational*

To withstand scrutiny under the Due Process Clause, a challenged statute must be "supported by a legitimate legislative purpose furthered by rational means." *Pension Benefit Guaranty Corp. v. R.A. Gray Co.*, 467 U.S. 717, 729 (1984). *See also Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 18-19 (1976). Furthermore, retroactive application of a statute is inappropriate when it will produce "substantial inequitable results." *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969); *Nieves*, 819 F.2d at 1251; *Mineo v. Port Authority of New York & New Jersey*, 779 F.2d 939, 943-44 (3d Cir. 1985). The *Vanterpool* court rightly applied this standard when it found the original 1984 Virgin Islands legislation to be prospective only. *See* 776 F.2d at 119 n.1.[16]

The Third Circuit correctly concluded that "there was no general welfare to be served by the 1986 retroactive application provision." *Nieves*, 819 F.2d at 1251 (Pet. for Cert. at A-30), explaining that legislation "aimed retroactively to benefit or burden a few identifiable persons is particularly vulnerable to the charge that it is not reasonably related to the asserted public purposes." *Id.* at 1249 (Pet. for Cert. at A-26). Even Petitioners acknowledge that the burden of the retroactive Virgin Islands statute falls entirely on Respondent Hess. Pet. for Cert. at 7.

16. Respondent Hess has not challenged the 1984 statute which *prospectively* abolished the borrowed employee doctrine. That 1984 statute does adjust the benefits and burdens of economic life to promote the common good. *Penn Central*, 438 U.S. at 124.

This statute, therefore, comes within this Court's warning that the Due Process Clause prohibits "retrospective civil legislation [whose] consequences are particularly 'harsh and oppressive'." *See U.S. Trust Co.*, 431 U.S. at 17 n.13, *quoting Welch v. Henry*, 305 U.S. 134, 147 (1938). The extreme penalty levied directly upon Respondent Hess in this case certainly cannot qualify as an "apportioning" of governmental costs. *See United States v. Darusmont*, 449 U.S. 292, 298 (1981) (per curiam), *quoting Welch v. Henry*, 305 U.S. at 146-47. Rather, the statute represents a denial of the fairness at the very heart of due process of law.

2. *Tageted Legislation Violates Due Process*

Legislatures (state assemblies, territorial legislatures, and even Congress) must act like *legislatures*, i.e. they must legislate prospectively, impartially, and with generality, rather than make particularized decisions which only punish or benefit specific individuals. *See, e.g., Nixon v. Administrator of General Services*, 433 U.S. 425, 484-86 (1977)(Stevens, J., concurring); *United States v. Brown*, 381 U.S. 437, 442-47, 454 n.29 (1965); *Springer v. Government of the Philippine Islands*, 277 U.S. 189, 201-02 (1928); *Hurtado v. California*, 110 U.S. 516, 535-36 (1884); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 137-39 (1810). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 463, 474-76, 491-92, 495-96, 499, 504, 1141 (1978); THE FEDERALIST No. 48 (J. Madison); Note, *The Bounds of Legislative Specification*, 72 Yale L.J. 330, 344-47 (1962).

Courts, in turn, decide particular cases under those general laws. *See, e.g., INS v. Chadha*, 462 U.S. 919, 960-62, 966-67 (1983) (Powell, J., concurring). It is clearly a violation of these basic principles for a legislature to specify a rule of decision in a particular, pending case. *See United States v. Klein*, 80 U.S. 128, 146-47 (1871).

In a recent case quite similar to the facts of the instant case, a federal court rightly invalidated a Washington state statute designed to alter the course of pending federal litigation. The court wrote:

> The 1986 Amendment represents an attempt by the Washington Legislature to protect its constituents from the consequence of pending litigation. That is an unconstitutional intrusion on the judicial responsibility to resolve cases and controversies.

In re *Washington Public Power Supply System Securities Litigation*, MDL No. 551 (W.D. Wash. April 30, 1987) (Browning, J.). *See also RR Village Ass'n, Inc. v. Denver Sewer Corp.*, 826 F.2d 1197, 1204 (2d Cir. 1987) ("the granting of a retroactive increase in sewer rates cannot be considered legislative action").

CONCLUSION

The retroactive application of the Virgin Islands statute abrogating the borrowed servant doctrine substantially impairs the obligations of Hess' contracts in violation of the Virgin Islands Contract Clause. Furthermore, this territorial legislation constitutes a Taking of Hess' private property without Just Compensation, and it denies Due Process of law. As the Third Circuit's ruling raises no important, unsettled issues and is correct-on several grounds--there is no need for this Court to review the case. Respondent Hess, therefore, urges this Court to deny the Petition.

Respectfully submitted,

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